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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 David Allen Harbour,

13 Defendant.
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No. CR-19-00898-001-PHX-DLR

ORDER

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16 Before the Court is Defendant David Allen Harbour's Motion to Obtain Grand Jury
17 Transcripts. (Doc. 130.) The motion is fully briefed and for the reasons set forth herein is
18 denied.

19 **I. Background**

20 Defendant seeks an order for the disclosure of the grand jury transcripts for cross
21 examination of trial witnesses. Counsel for Defendant alleges that, through
22 communications with government counsel, he learned that the Grand Jury indictment was
23 based on the testimony of an IRS Agent ("Agent"). Defendant alleges that the Agent likely
24 took statements from fact witnesses, individuals with years of dealings with Defendant,
25 and "most likely relayed these statements to the Grand Jury to obtain the indictment."
26 (Doc. 130 at 2.) Defendant wants to use the transcripts to cross examine the Agent in the
27 event any fact witness gave a statement to the Agent that might be inconsistent with the
28 witness's trial testimony. Defendant also argues the transcripts are needed to determine if

1 there are errors in the government's investigation such as "whether the government failed
 2 to subpoena critical documents, whether the government failed to interview material
 3 witnesses, whether the government ignored pertinent and exculpatory evidence, and
 4 whether the government made assumptions in its investigation without any foundation."
 5 *Id.*

6 There is a "long-established policy that maintains the secrecy of the grand jury
 7 proceedings in the federal courts." *United States v. Proctor & Gamble Co.*, 356 U.S. 677,
 8 681 (1958). "This 'indispensable secrecy of grand jury proceedings,' *United States v.*
 9 *Johnson*, 319 U.S. 503, 513 (1943), must not be broken except where there is a compelling
 10 necessity. There are instances when that need will outweigh the countervailing policy. But
 11 they must be shown with particularity." *Id.* at 682. Rule 6(e) provides that grand jury
 12 transcripts may be disclosed "at the request of a defendant who shows that a ground may
 13 exist to dismiss the indictment because of a matter that occurred before the grand jury."
 14 Fed. R. Crim. P. 6(e)(3)(E)(ii). The Supreme Court described Rule 6(e)'s standard as
 15 follows:

16 Parties seeking grand jury transcripts under Rule 6(e) must
 17 show that the material they seek is needed to avoid a possible
 18 injustice in another judicial proceeding, that the need for
 19 disclosure is greater than the need for continued secrecy, and
 the their request is structured to cover only the material so
 needed.

20 *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979). Notably, the trial
 21 court should order disclosure of grand jury transcripts only when the party seeking them
 22 has demonstrated that a "particularized need exists [] which outweighs the policy of
 23 secrecy." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) (internal
 24 quotations omitted). When considerations justifying secrecy are lesser, the party asserting
 25 a need for grand jury transcripts will similarly shoulder a lesser burden to show
 26 justification. *Douglas Oil*, 441 U.S. at 222-223. However, a defendant's claim of
 27 particularized need must be more than mere speculation. *U.S. v. Walczak*, 783 F.2d 852,
 28 857 (9th Cir. 1986). Ultimately, the decision whether to grant a request for grand jury

1 transcripts is within the sound discretion of the trial court. *Id.* (citing *United States v.*
2 *Murray*, 751 F.2d 1528, 1533 (9th Cir. 1985)).

3 **II. Discussion**

4 The burden is on Defendant to show that disclosure of grand jury transcripts is
5 appropriate. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959). The
6 argument for disclosure, here, is like the argument made in *Walczak*—that the testifying
7 officer might have provided information to the grand jury that was different from or
8 inconsistent with information obtained from other witnesses. *Id.* Specifically, the Ninth
9 Circuit summarized the argument as the need “to determine whether the testimony of law
10 enforcement officers improperly summarized the testimony of other agents.” *Id.* In
11 rejecting that argument and affirming the trial court’s decision to deny the request for
12 transcripts, the Court stated,

13 Even under the permissive *Dennis* interpretation of the
14 “particularized need” standard, the district court was correct in
15 denying Walczak's motion to discover the grand jury
16 transcripts. Walczak gave two reasons why he sought
17 discovery of the transcripts: to show that the grand jury had no
18 evidence that the district court had jurisdiction to prosecute,
19 **and to determine whether the testimony of law
enforcement officers improperly summarized the
testimony of other agents.** Neither reason constitutes
“particularized need.” [] **Walczak alleges no facts to support
his second reason, which is therefore speculative.**
Consequently, the district court's denial of Walczak's motion
to discover the grand jury transcripts was correct.

20 *Id.* (emphasis added). Defendant’s argument—that the transcripts are needed because a
21 fact witness may have given a statement to the Agent inconsistent with their trial
22 testimony—is based on speculation. While particularized need can be shown when grand
23 jury records are necessary to impeach a witness, more than a desire for a “fishing
24 expedition” is required. *United States v. Kim*, 577 F.2d 473, 478 (9th Cir. 1978).
25 Defendant’s mere speculation, here, that the transcripts *might* reveal inconsistencies is not
26 sufficient to establish a particularized need to release the transcripts to him.

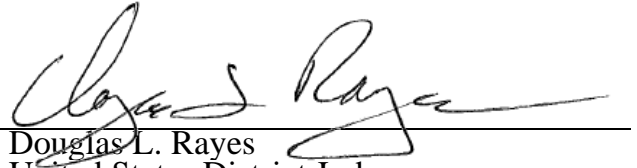
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1 **IT IS ORDERED** that Defendant David Allen Harbour's Motion to Obtain Grand
2 Jury Transcripts (Doc. 130) is **DENIED**.

3 Dated this 5th day of October, 2020.

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Douglas L. Rayes
United States District Judge